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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,

Petitioners,

v.

FEDERAL POWER COMMISSION and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., TOWN OF CORNWALL and VILLAGE OF CORNWALL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Sierra Club and its Atlantic Chapter hereby respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 22, 1971 in the case entitled *Scenic Hudson Preservation Conference, et al.* v. *Federal Power Commission, et al.*, in which the Sierra Club and its Atlantic Chapter were petitioners.

Opinions Below

The opinion of the Court of Appeals, which is officially reported at 453 F.2d 463, is set forth in the appendix to the petition for certiorari, filed simultaneously herewith, by Scenic Hudson Preservation Conference, et al (the "Scenic Hudson petition"). A copy of the opinion and order of the Federal Power Commission is filed as a separate appendix to the Scenic Hudson petition. An earlier licensing order in the same matter was set aside and the proceedings remanded to the Commission in *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 346 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), a copy of which is also set forth in the appendix to the Scenic Hudson petition.

Jurisdiction

The judgment of the Court of Appeals was entered on October 22, 1971. Timely applications for rehearing *en banc* were denied by an evenly divided court on November 26, 1971. The time within which an application for certiorari might be made was extended by Mr. Justice Marshall to and including March 25, 1972. This Court's jurisdiction is invoked under 28 U.S.C. §1251(1) and the Federal Power Act, §313(b), 16 U.S.C. §8251(b).

Questions Presented

Petitioners The Sierra Club and its Atlantic Chapter hereby beg leave to incorporate by reference the statement of the questions presented set forth in the Scenic Hudson petition.

Statutes Involved

This petition involves §§101 and 102 of the National Environmental Policy Act [42 U.S.C. §§4331-4332] and §10 (a) of the Federal Power Act [16 U.S.C. §803(a)]. The text of each of the said statutes is set forth in the Scenic Hudson petition.

Statement

Petitioners The Sierra Club and its Atlantic Chapter hereby beg leave to incorporate by reference the Statement set forth in the Scenic Hudson petition.

Reasons for Granting the Writ

Petitioners The Sierra Club and its Atlantic Chapter beg leave to incorporate by reference the reasons for granting the writ set forth in the Scenic Hudson petition, and respectfully set forth the following additional reasons.

1. A number of recent developments render it essential that this Court review the decision of the court below and provide a definitive interpretation of the mandates of the National Environmental Policy Act ("NEPA"). These developments include the conflicts between and within the Courts of Appeals and between District Courts, cited and discussed in the Scenic Hudson petition. They also include the growing concern expressed by administrative agencies, including the Federal Power Commission, regarding their responsibilities under NEPA.

The said court conflicts and administrative agency concerns are the subjects of a number of current important studies and investigations. One study is presently being undertaken jointly by the United States Senate Commit-

tees on Interior and Insular Affairs and on Public Works, which held oversight hearings on March 6 and March 7, 1972. One of the principal witnesses was Mr. Roger C. Cramton, Chairman of the Administrative Conference of the United States. In his statement, Mr. Cramton discussed in detail most of the recent Court of Appeals and District Court decisions interpreting NEPA which are cited and discussed in the Scenic Hudson petition.

Mr. Cramton in his statement referred to, among other things, "Uncertainties In the Meaning and Application of NEPA", including the "Scope of NEPA" and the "Substantive Effects of NEPA". With respect to its substantive effect, Mr. Cramton stated:

> "One area of considerable uncertainty is how NEPA operates to affect the decisional equation in each agency. There is no question that NEPA requires decision-making procedures which will permit agencies to take environmental values into account. But what weight is to be given to such values where they conflict with the values expressed or implicit in the statute, the agency is administering? Section 105 of NEPA simply states that the policies and goals of NEPA are 'supplementary' to those set forth in the agencies' existing authorizations, a statement which provides little practical guidance."

At another point in his testimony, Mr. Cramton referred to "severe difficulties" which "Federal agencies appear to be encountering . . . in complying with NEPA as construed by reviewing courts."*

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* Petitioners disagree with many of the positions taken by Mr. Cramton, but cite and quote his comments to demonstrate the critical importance of a Supreme Court interpretation of NEPA.

Other witnesses at the said oversight hearings, each of whom testified about problems of the scope of the duties of administrative agencies under NEPA, were Russell E. Train, Chairman on the Council of Environmental Quality; William D. Ruckelshaus, Environmental Protection Agency Administrator; James R. Schlesinger, Chairman of the Atomic Energy Commission; John N. Nassikas, Chairman of the Federal Power Commission, and Rogers C. B. Morton, Secretary of the Interior. The testimony of each of the said high governmental officials pointedly demonstrates the need of a Supreme Court determination of the duties under NEPA of administrative agencies such as the Federal Power Commission.

Petitioners submit that grant of certiorari in this case, marking the beginning of the judicial response to increasing environmental degradation, the principal federal legislative response to which has been NEPA, would furnish the best opportunity for this Court to formulate some answers to the questions raised by Mr. Cramton and the other witnesses named above.

2. The Scenic Hudson petition describes a number of ways in which the Federal Power Commission failed to comply with the mandates of the National Environmental Policy Act, including its failures to consult with other agencies and to meet the requirements of Section 102(2)(C) regarding the detailed environmental impact statement. To these failures must be added one other—the failure to prepare the impact statement that could be subject to scrutiny *before* the Commission made its final decision.

The requirement that an impact statement be prepared *prior* to the final decision is clear from the last sentence of §102(2)(C) which mandates that the statement ". . . shall accompany the proposal [here the license application for the Storm King plant] through the existing agency re-

view processes." In this case, this requirement was not met. The Federal Power Commission instead left to its final order the development of a purported impact statement, by which time it was too late to subject the statement to the further scrutiny that NEPA contemplates.

Despite the clear language of Section 102(2)(C), the court below held that the Commission's final opinion, without more, was sufficient to meet the mandates of the Section. Three months later, however, in *Greene County Planning Board* v. *F.P.C.* (Docket Nos. 71-1991, 71-1996, 2nd Cir., Jan. 17, 1972), a different panel of the same court reached an opposite conclusion, holding that the Commission, through its staff, must prepare an impact statement that can be subject to scrutiny *before* a final decision is made. It is submitted that the conclusion of the *Greene County* panel is the correct one, and that the decision of the court below in this case is simply not consistent with the mandates of NEPA. In any event, given the diverse interpretations of the separate panels of the court below, and the importance of clarifying for all concerned the procedures that must be followed under NEPA, this Court should exercise its supervisory powers by reviewing this case and providing a definitive interpretation of the statute.

3. In his dissent from the denial by the court below of the several petitions for rehearing *en banc* in this case, Judge Timbers stated:

> "Aside from the fact that four of the eight active judges of this Court (including two members of the panel who heard and decided the case originally) have voted in favor of *en banc* reconsideration, it does seem to me that a substantial question of unusual importance is presented by the panel's application of the substantial evidence test in reviewing the

> FPC's determination that the benefits of the project outweigh the environmental damages." (453 F. 2d at 494).

This commentary cuts very much to the heart of this case. For throughout its opinion, the court below relied on a rigorous, mechanical application of the substantial evidence test to uphold the Power Commission's conclusions. In this connection, the court never took note of the fact that the expertise of the Commission does not extend to critical environmental matters, and, as a consequence, that the usual rationale for judicial deference to agency findings was not present in this case. Nor did the court below take cognizance of the heightened responsibilities for environmental protection that have been imposed on agencies by NEPA and that can only become a reality if rigorously enforced by the courts. See *Calvert Cliffs' Coordinating Committee v. A.E.C.*, 449 F. 2d 1109 (D.C. Cir., 1971).

Petitioners respectfully submit that if the substantial evidence test were permitted to be applied as the court below has applied it in this case, NEPA would be rendered meaningless. In these circumstances, the essentially unbounded discretion of administrative agencies, taken together with their historical priorities (e.g., power development in the case of the FPC), would mean that environmental protection would inevitably be relegated to a subordinate role. This is exactly what has happened in this case—and it confounds the whole purpose of NEPA. Such a result should not be permitted to stand.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

March 24, 1972.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

APR 26 1972

No. 71-1219

SCENIC HUDSON PRESERVATION CONFERENCE, *et al.*,
Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1220

THE CITY OF NEW YORK,
Petitioner,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1221

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,
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FEDERAL POWER COMMISSION,
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Respondents.

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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Dated: April 25, 1972

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Opinion Below

The opinion below ("*Scenic Hudson II*") of the United States Court of Appeals for the Second Circuit is reported at 453 F.2d 463 and is reprinted in the appendices of the petitions for certiorari filed herein by Scenic Hudson Preservation Conference and City of New York. That opinion reviewed and affirmed, as supported by substantial evidence and the applicable statutes, the Federal Power Commission's Order and Opinion licensing construction of the proposed Cornwall Project, a pumped storage hydroelectric facility to be constructed and operated at an underground site on the Hudson River by respondent, Consolidated Edison Company of New York, Inc.

Jurisdiction

Jurisdiction is authorized under 28 U.S.C. §1254(1) and the Federal Power Act §313(b), 16 U.S.C. §825*l*(b).

Questions Presented

1. Whether the Court of Appeals was bound by the mandate of §313(b) of the Federal Power Act which provides that "The finding of the Commission as to the facts if supported by substantial evidence, shall be conclusive"; or whether some standard other than the substantial evidence rule should have been applied because the case involved "environmental issues".

2. Whether the letter and intent of the National Environmental Policy Act were followed where the Federal Power Commission conducted extensive hearings in re-

sponse to the mandate of the Court of Appeals in the first *Scenic Hudson* case [354 F.2d 608 (2d Cir. 1965)] ("Scenic Hudson I") and considered every conceivable issue concerning the environmental effect of the Project and all feasible alternatives to the Project; and where the Commission's procedure adopted the interdisciplinary approach required by the National Environmental Policy Act even though the Act itself was not passed until the Commission's extensive hearings were concluded.

3. Whether the Commission met its responsibilities under §10(a) of the Federal Power Act when it found that the project is " . . . best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use and benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; . . . ".

4. Whether Section 27 of the Federal Power Act, which has been consistently construed to require only that just compensation be paid for any interference by a licensed project with vested water rights, should be construed to give the City of New York a veto over the Federal Power Commission's license where substantial evidence demonstrates that the Project will not interfere with the City's Catskill Aqueduct and where there is no plan to control, appropriate or use any part of the City's water supply.

Statement of the Case

Petitioners seek review of the October 1971 decision of the United States Court of Appeals for the Second Circuit which reviewed and upheld the license order of the Federal Power Commission issued on August 19, 1970, following an earlier remand of the same FPC proceeding to the Commission in December, 1965 by a decision of the same Court of Appeals in *Scenic Hudson I*. In its October 1971 decision in *Scenic Hudson II*, the Court of Appeals found that the Commission's license order was in compliance with the strict and detailed mandate of its 1965 remand; that there was substantial evidence to support the Commission's decision on all the issues; and that the Commission had complied with all applicable statutory requirements, including those imposed by the National Environmental Policy Act, which was enacted on January 1, 1970, several months after the hearings on remand had closed.

The Remanded Proceedings Before the FPC

The Federal Power Commission first licensed this Project with a partially visible powerhouse by license order issued March 9, 1965. In *Scenic Hudson I* the Court of Appeals found that the Commission had "failed to compile a record which is sufficient to support its decision" (354 F.2d at 612). It directed the Commission to develop a complete record as to the totality of the Project's immediate and long-term effects, specifically covering the need for the Project in the terms of the public good, consideration of all reasonable alternatives to the Project, consideration of the Project's effect upon fish life in the Hudson River, consideration of the preservation of the nat-

ural beauty and the national historic shrines of the Hudson Highlands and consideration of possible additional undergrounding of the Project's transmission lines.

The Commission thereupon ordered that further hearings be held and that all matters be considered in depth. The Company proposed to completely underground the powerhouse. The hearings commenced November 14, 1966 and continued, with several short recesses, until May 23, 1967. Shortly thereafter, the State of Connecticut's Board of Fisheries and Game was permitted to intervene at further hearings in the fall of 1967. The Presiding Examiner spent two days viewing the Project site and also viewed a gas turbine in operation.* On August 6, 1968 the Presiding Examiner issued an Initial Decision recommending that the Project be licensed.

Subsequently, the record was again reopened upon intervention by the City of New York which alleged that the proposed underground powerhouse might pose a risk to the safety of the City's Catskill Aqueduct. The Palisades Interstate Park Commission also then intervened on the issue of the suitability of an alternate powerhouse site beneath Park lands.

At the conclusion of these hearings in May 1969, the record included more than 19,000 pages of testimony and 675 exhibits.

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* Gas turbines (which are land-based jet engines) were proposed by Scenic Hudson as a suitable alternative means of generation. "Gas", as used in describing these turbines, is a misnomer. While turbines can burn natural gas, in the face of the present gas shortage (see *Louisiana Power & Light* v. *FPC*, —— F2d ——, 5th Cir., 1972, cert. granted —— U.S. —— 1972) it is not feasible to use natural gas to fuel such turbines. Instead, they burn kerosene or light oil, a more troublesome potential source of air pollution than natural gas.

The Presiding Examiner issued an eighty-one page supplemental initial decision on December 23, 1969, recommending licensing of the Project at the original site. He found that the Project posed no risks to the safety of the Aqueduct.

All five Commissioners viewed the area of the proposed Project, and on August 19, 1970, the Commission issued its order licensing the Project with the underground powerhouse at the Cornwall site, or, alternatively, at the Palisades Park site.*

Scenic Hudson's vigorous criticism of the Commission's license order for the Project is replete with unwarranted allegations, such as that the Commission's opinion was "mainly concerned with power considerations" (Scenic Hudson's petition for certiorari, p. 3). This simply is not the case. It is difficult to conceive of a more comprehensive treatment of a broad scope of environmental issues by any regulatory agency than that accomplished by the Federal Power Commission in this proceeding. As the Commission observed,

> "In accordance with the mandate of the Court of Appeals and the Commission's planning responsibility under Section 10(a) of the Federal Power Act, and recognizing an affirmative duty to inquire into all relevant facts, our ultimate decision in this case is not the resolution of litigated issues formulated by the parties but rather the determination of public policy by considering 'the totality of the project's immediate and

* The FPC has licensed the Project with the powerhouse at the original Cornwall site. In the event that upon court review its decision be overturned, it also licensed the Project with the powerhouse located approximately one mile downstream at a site beneath undeveloped lands belonging to the Palisades Interstate Park Commission.

long range effects' consistent with the public interest. 354 F.2d 620." (FPC Opinion at para. 45; City's Appendix, p. 77a).

The Commission's opinion and order and the 19,000 page record compiled through the years of hearings examined in depth the "totality" of the Project's effects, including issues concerning, among others, the following environmental factors: appearance of the reservoir dikes from nearby and from distant high points; dike safety; likelihood of seepage through or under the dikes or out of the bottom of the reservoir; containment of any seepage; effects of any seepage on local water supplies; nature of lands taken for the reservoir and the best use thereof; plantings on the dikes; effects of reservoir drawdowns; geologic effect of reservoir and tunnel construction; appearance of the river front at the power station site and upstream and downstream therefrom; minutely detailed examination of the appearance of the Project site before, during and after construction, including consideration of access roads, tunnels and even the small ventilating shaft caps; the portal entrance to the underground chambers; planting plans; details concerning tailrace design and excavations; several weeks of hearings concerning the safety of the City's Catskill Aqueduct; fish protection, including consideration of the nature of the fishery, fish behavior, protective screen design and a three-year study of the fishery jointly conducted by federal and state agencies; effects of waterfront rehabilitation and local park construction planned for development and transfer to the Village of Cornwall as part of the Project's recreational benefits; study of the aesthetic, economic and electric system reliability factors associated with the installation of submarine, underground, and over-

head transmission facilities along many alternate routes; study of air pollution control and noise pollution benefits and detriments of the Project and alternate forms of generation; and consideration of the Hudson River Valley as part of our historic and cultural heritage.

The foregoing is not intended to be exhaustive, and it does not include reference to the important issue of economic power supply and the critical issue of a reliable power supply; nor does it indicate the depth of the Commission's study of suggested alternatives to the project which ran the gamut of existing and developing technology from "gas" turbines and nuclear plants to magnetohydrodynamics and fuel cells. However, it does illustrate the careful attention devoted to the environment by the Commission and supports the Court of Appeals' conclusion that:

> "The thrust of petitioners' arguments is that the principle of preservation of scenic beauty permits of no intrusion at all into this area and that, therefore, no power plant, no matter how innocuous, may be built. This is clearly a policy determination which, whatever may be our personal views, we do not have the power to impose on the Commission. The Commission has complied with the terms of our remand by giving careful and thorough consideration to the impact of the project on the environment. The conclusions it has reached are supported by substantial evidence." (453 F.2d at 475-6; City's Appendix, p. 25a).

Of course, Scenic Hudson deprecates any evidence presented which is contrary to its own viewpoint, even to the extent of condemning Mr. Gilmore Clark as a "professional landscaper" and a "self-serving" witness (see Scenic Hudson's petition for certiorari at p. 22, fn. 10). Such charac-

terizations of any witness are improper, but when applied to professional planners of the eminent stature of Mr. Clarke (and Mr. Herbert Conover, the other witness referred to in the footnote) they are shocking. Mr. Clarke founded the Department of Regional Planning in the Colleges of Architecture and Engineering at Cornell University, was a member and chairman of the Commission of Fine Arts in Washington, and is a former "Collaborator at Large" for the National Park Service. He is also senior partner in the firm of Clarke & Rapuano, which has been described by the Federal Power Commission as "one of the country's leading firms of landscape architects". Mr. Conover is director of the Parks, Recreation and Site Planning Department of Uhl, Hall & Rich with more than thirty years experience in planning, designing and constructing parks and recreational areas.

Aside from Messrs. Clarke and Conover, witnesses in the proceeding included such well known personalities as Professor Charles W. Eliot of Harvard, who testified for Scenic Hudson, David Brower, who testified for the Sierra Club, Mr. Leon Keyserling, who testified for the Utility Workers of America, Dr. Edward J. Teller, the noted physicist and consultant to Governor Rockefeller, who testified on power reliability and air pollution control, Conrad Wirth, former Director of the National Park Service, and Brooks Atkinson. In addition, many experts preeminent in their particular disciplines presented extensive testimony to the Commission.*

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* The witnesses before the Commission were: ***Acoustical engineer:*** Stannard M. Potter; ***Civil engineers:*** J. Barry Cooke, Don U. Deere, Torris Eide, Abraham Groopman, James M. Mullarkey, Phillip C. Rutledge, Jack M. Shepley, Fred C. Stein, William E. Trommershausen, Malcolm T. Wane, Herbert C. Westfall, Gerald

Project Description

The Project is a pumped storage hydroelectric plant of 2,000 megawatts (i.e., 2,000,000 kilowatts) capacity composed of an underground powerhouse near the Hudson River, connected by a water tunnel to an upper reservoir about two miles inland and 1,000 feet above the level of the River, together with transmission lines connecting the Project to Con Edison's transmission system. The transmission lines from the Project comprise submarine and underground cables beneath the Hudson River and beyond its east bank to a point entirely out of sight of the Hudson River, and overhead lines running about twelve miles from the underground termination point to connect with exist-

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R. Wilson; *Economists:* Rev. William T. Hogan, Leon Keyserling, Reynold M. Sachs; *Electrical engineers:* William J. Balet, John V. Cleary, F. N. Cuneo, Thomas C. Duncan, Dr. Eric T. B. Gross, Joseph J. A. Jessel, Dr. Alexander Kusko, Alexander Lurkis, Wilbur D. March, E. Barrett Shew, M. L. Waring; *Fish biologists:* Theodore B. Bampton, Milo C. Bell, Forrest R. Hauck, James R. Westman, Edward C. Raney, William H. Massman, Alfred Perlmutter, Robert E. Stevens, Charles H. Walburg; *General engineer:* Joseph J. Solters; *Geological engineers:* Charles P. Berkey, Thomas W. Fluhr, Portland P. Fox, Dr. Bartlett W. Paulding, Jr.; *Geology professor:* A. Scott Warthin, Jr.; *Hydraulic engineers:* Lawrence C. Neale, Charles H. Wagner; *Mechanical engineers:* H. W. Dierman, Arthur S. Pearson; *Nuclear engineers:* Joseph J. Di Nunno, John M. Vallance; *Physicist:* Dr. Edward Teller; *Planners:* William Blakey, Robert S. Bryan, Gilmore D. Clarke, Charles W. Eliot, II, Peter Garrison, Robert Mickle, Herbert S. Conover; *Real estate appraisers:* Morris H. Bannister, William M. Kinnard, Jr. Also, *Art historian:* Rudolff G. Wunderlich; *Art professor:* Vincent J. Scully; *Conservationists:* Brooks Atkinson, David Brower, Charles H. Callison, Phillip E. Dodge, Richard E. Harrison, Richard Hooper Pough, Anthony Wayne Smith; *Ecologist:* Ronald R. Dagon; *Historians:* Carl Carmer, Margaret Farnsworth, Benjamin Frazier, Jean Saunders; *Public officials:* A. K. Morgan, Gordon Cameron, Michael J. Donahue, J. H. Downey, Harold J. Dyer, Joseph X. Mullin, Conrad Wirth, James E. Wright; and *Science writer:* Jerome Wykoff.

ing transmission lines. The Project is designed to meet the needs of New York City and Westchester County for electricity by pumping water from the Hudson River into a storage reservoir during hours of low energy demand at night and on weekends, and releasing the water to generate electricity during hours of greatest, or "peak", demand.* The Project will operate essentially as a storage battery to provide necessary reliability to the interconnected electric system by providing virtually instantaneous response at times of system emergency, such as the one which resulted in the blackout over Northeastern United States in November, 1965 (*Scenic Hudson II*, 453 F.2d at 471; City's Appendix, p. 16a).

The underground powerhouse will be constructed in solid granite deep beneath the surface on the west bank of the Hudson River at the northerly edge of the Hudson Highlands. Construction of the Project at this location will permit combined use of the area's unique geography to assist in the supply of critically needed electrical energy to the Con Edison and interconnected systems, as well as to help preserve and enhance the scenery of the area for public recreation and enjoyment. The Project site originally contained some 32 run-down structures, all but one of which have been removed by Con Edison. Penn Central Railroad tracks run along the River's edge in front of the

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*City lists as one of the reasons for its opposition concern for the quality of the air because it believes that most of the pumping energy necessary for Cornwall will be generated by in-City plants. However, as the Commission found, the Con Edison system, using the Project, provides the best means of alleviating air pollution resulting from electric generation in New York City of any of the many alternates examined, with the exception of an all nuclear alternative to Cornwall, which is unsuitable from the standpoint of providing reliability to the system (FPC Opinion at para. 92, City's Appendix, p. 94a).

underground powerhouse site and directly across the Project tailrace, or water outlet. While the Highlands are indeed scenic and attractive, the immediate Project area has been blighted by the decay of nineteenth century industrial and commercial buildings. The Project will provide scenic improvement of this area and offer needed public access to the River's edge for recreational purposes.

The top of Storm King Mountain rises more than 1,300 feet above and about one mile to the west of the River. The perimeter of its base extends more than 3,500 feet along the River. In this context, the Commission found and the Court of Appeals affirmed that the few visible features of the Project will be of no scenic consequence in the scale of the Project's natural environment.

Nevertheless, petitioners persist in their dramatized descriptions of the effect of the Project on the scenery of the area. They say the mountain will be "wounded" and will "have its legs cut from under it". These and similar expressions are not supported by the facts. For example, petitioners consistently refer to the proposed Project as an "industrial" intrusion in the Hudson Highlands. But they ignore the fact that, unlike most "industries," the powerhouse will be underground. Moreover, the Project will be operated by remote control from a dispatching center in New York City. The on-site operating staff will comprise only a small maintenance crew. Operation of the Project will not involve any of the activities characteristic of conventional "industrial" factories, such as heavy employee traffic at the time of shift changes, in-shipment of raw materials, out-shipment of finished products, visible industrial buildings, noise, etc.

There Is No Basis for the Granting of the Requested Writ

1. ***The Second Circuit acted correctly under decisions of this Court, and pursuant to the Federal Power Act, in determining that the Commission's findings, policy judgments and conclusions were supported by substantial evidence, were rationally based, and were made in accordance with law.***

Section 313(b) of the Federal Power Act provides that:

> "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 16 U.S.C. §825*l*(b).

In 1966 this Court interpreted the statutory standard of substantial evidence as

> "... something less than the weight of evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 at 620 (1966).

As recently as 1971 this Court, applying that same standard, found that another Court of Appeals had "overstepped the role of the judiciary" when that court substituted its decision for the decision of the Commission (*Gainesville Utilities Department* v. *Florida Power Corporation*, 402 U.S. 515 at 527 (1971)).

This Court has consistently held that the licensing of Projects such as this plant has been entrusted by Congress to

> "... the informed judgment of the Commission, and not to the preferences of reviewing courts." *Permian Basin Area Rate Cases*, 390 U.S. 747 at 767 (1968).

Petitioners attempted to have the Court of Appeals apply a different standard of judicial review in this case, alleging that the substantial evidence test should not apply to environmental issues. The Court below properly rejected that contention, holding that none of the cases relied on by petitioners (*Citizens to Preserve Overton Park Inc.* v. *Volpe*, 401 U.S. 402 (1971); *Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967); *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971)), nor any other authority sanctioned a new or different standard of judicial review. In all of the cases relied on by petitioners, the reviewing courts found that there was failure of an agency or other governmental authority to give adequate consideration to the environmental factors in the situations with which they were presented. However, the court below found that where, as here, the Commission has considered all relevant factors and where the challenged findings based on such full consideration are supported by substantial evidence, the decision below must stand. The Court of Appeals adopted the correct standard of review and applied it properly.

Petitioners invite this Court to apply different standards of review. Petitioner Scenic Hudson argues that the substantial evidence standard is not a proper one for review of the Commission's findings on scenic beauty. Petitioner City argues that such a standard is not a proper one to review the Commission's findings with regard to the safety of the Catskill Aqueduct. Neither of these contentions has any merit in law.

The Commission, under Section 10(a) of the Federal Power Act, has been authorized and directed to consider

all aspects of a project's development.* Indeed, almost twenty years ago, the Commission refused to license a project solely because of what it regarded as the adverse environmental impact of the Project on aesthetics and recreation, and its decision was upheld by the Seventh Circuit Court of Appeals (*Namekagon Hydro Co.* v. *FPC*, 216 F. 2d 509 (7th Cir. 1954)).**

The Court of Appeals employed the proper standard of review of all of the Commission's findings under the directives of this Court and pursuant to the Federal Power Act. There is no basis in law for overturning its decision. Indeed, in view of the statutory mandate, no imperative or useful purpose would be served by a grant of certiorari to review the issue posed.

2. *The Court of Appeals was correct in finding that the requirements of the National Environmental Policy Act have been fully met.*

The Court of Appeals found that all the requirements of the National Environmental Policy Act ("NEPA") had been fully met by the FPC:

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* Petitioners' reliance on the *Calvert Cliffs'* decision (*Calvert Cliffs' Coordinating Comm.* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971)) is thus misplaced. Unlike the FPC, prior to the enactment of the National Environmental Policy Act (42 U.S.C. §§4321 et seq.), the Atomic Energy Commission had no authority to inquire into the aesthetic or environmental aspects of any project before it.

** Scenic Hudson is thus incorrect in arguing that it is "only in this case" that the Commission has had to face the problem of scenic beauty. In every application for license for a major (over 2,000 horsepower) project, the Commission requires (18 C.F.R. §4.41) that a proposed plan for full public utilization of project waters and adjacent lands for "recreational purposes" be submitted. Recreational purposes, as the Court of Appeals has pointed out (see p. 26 *infra*) includes ". . . the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites."

> "The Commission has complied with the specific directives contained in Section 102 of the Act. The hearings reflected the 'systematic, interdisciplinary approach' required by that section. The Commission consulted with other agencies, as required by Section 102, including the Chief of Engineers, the Advisory Council on Historic Preservation, the Department of the Interior, the Atomic Energy Commission and a number of state and local groups that stand to be affected. The environmental statement required by Section 102(2)(C) of the Act, 42 U.S.C. §4332(2)(C) (1964), was submitted in the form of the Commission's opinion. In view of the exhaustive environmental findings which occupy a substantial portion of the Commission's opinion, and the Commission's explicit conformance with the enumerated portions of the required statement, we conclude that full compliance with the National Environmental Policy [Act] has been demonstrated." (453 F.2d at 481; City's Appendix, p. 37a).

Scenic Hudson suggests that the submission of the Commission's opinion to the Council on Environmental Quality was a purely mechanical compliance with Section 102(2)(C)(i) of the Act which did not provide ". . . a framework which will ensure individualized consideration to all important environmental factors" (Scenic Hudson petition, p. 22). However, the "framework" required to protect the environment in this proceeding was established by *Scenic Hudson I* and the Commission's own broad investigation. Most importantly, there was extensive, detailed and vigorous litigation concerning virtually every environmental aspect of Project construction and operation which occupied the five years between reviews by the Court of Appeals and which is indicated by the partial specification of environmental issues set forth at pages 7-8 *supra*.

In considering these issues, the parties and the Commission went beyond the mere recitation of opinion as to the environmental effects of the Project and focused upon fact.

For example, Scenic Hudson's petition at page 23, note 11, refers to testimony that the tailrace,

> "cut into the mountain slope would be a permanent wound in the side of the mountain which could change the character of the scene: it would " 'cut the legs out from under the north flank of mountain by destroying the continuity of its base as it rises out of the water'—a continuity' essential to the sweeping lift which gives the profile of Storm King its remarkable energy."

That is sweeping and energetic rhetoric, but it is hardly consistent with the fact that the maximum rock cut for the tailrace visible above the existing railroad embankment passing in front of the tailrace will reach but twenty feet above that railroad against a backdrop of a mountain more than 1300 feet high. Moreover, vines will be planted above the cut so as to partially obscure even that feature. Far from "belittling" any adverse environmental effects of the Project, as Scenic Hudson petulantly claims at page 23 of its petition, the Commission cast such effects in their true light by testing rhetoric against fact and concluding that:

> "The evidence in this proceeding establishes that the project as now designed is compatible with the natural environment and will have no adverse effect on the ecology of the area. No water pollution or damage to the fishery of the river will be created by the project. No diminution of the water quality in the river will result from the project. Air pollution by reason of the project will be less than would otherwise be possible

in meeting the needs for electric energy. New recreational resources will be created by the project. None of the numerous alternatives considered in detail can meet the social, economic, and environmental requirements of our society as well as the proposed project. Its potential contribution to reliable electric energy to insure the health, safety, and convenience of millions of people is unique and unequalled by any other alternative. The capability of the proposed project to meet the peaking energy requirements is not exceeded by any alternative and its capability to do so in a more economic manner is also established by the record in this proceeding. Any short-term adverse impact on the natural environment is more than offset by the enhancement of long-term productivity which will result from the project. The resources which will be committed to this project are the acreage it will necessarily encompass and the fuel resources which will be committed to pumping energy. But the electric energy resources which will be generated by the commitment of such resources will many times over 'foster and promote the general welfare' and 'fulfill the social, economic and other requirements of present and future generations'."

. . .

"Accordingly, we are licensing this pumped storage project because the record in this proceeding establishes that this is the best use of available resources to meet the requirements for electric energy with the minimum adverse impact on our environment. The record establishes that no alternative can so well meet the requirements with lesser detriment to our environment." (FPC Opinion paras. 217 and 218; City's Appendix, pp. 134a-135a).

Scenic Hudson's contention that the Commission did not comply with the goals and directives of NEPA ignores the language and legislative history of the Act and dis-

torts the intent of its expression of legislative policy. There can be no reasonable doubt that the Commission's compliance with the Court of Appeals' remand means that it more than complied with the far more generalized language of NEPA.

The Council on Environmental Quality recognized the Commission's Opinion and Order in this case as the equivalent of a separate impact statement by accepting the Commission's opinion and order as a statement on environmental impact. The Council's list of final impact statements compiled from March 20, 1970 through December 17, 1970 includes the Commission's license order as the impact statement for the Project (1 Environmental Reporter; Current Developments 899 (No. 35, December 25, 1970)).

Petitioner's allegation concerning inadequate compliance with the consultative requirements of Section 102(2)(C) are not supported by the record. Considerable and appropriate consultation did take place during the proceedings prior to the Commission's decision with all those having "jurisdiction by law or special expertise", as follows:

(i) The Commission submitted Con Edison's plans for the Project to the Chief of Engineers, U.S. Army, and received his approval as far as the interests of navigation were involved (FPC Opinion, para. 173).

(ii) The Commission also submitted the Project plans and a Staff brief relating to the Project to the Advisory Council on Historic Preservation (16 U.S.C. §470 et seq.). The Council found:

> "Plans I, II and Alternate II presently under consideration by the Federal Power Commission are almost

identical in the minimal adverse effect on the scenic values for which the Park was initially established. None of the plans affects adversely the cooperative effort that permits the continuation of the Park as a conservation area" (Quoted in FPC Opinion, para. 203).

The balance of the Commission's findings concerning the Advisory Council are set forth in its August 19, 1970 order, reprinted at pages 129a-131a of City's Appendix.

(iii) The Department of Interior was advised of Con Edison's plans and participated fully in the proceedings.

(iv) The Atomic Energy Commission made available its Assistant Director of the Division of Safety Standards, to present evidence as to regulatory and radiation safety criteria relating to siting of nuclear units. Mr. John V. Vallance, Senior Technical Assistant in the Office of Program Analysis of the Division of Reactor Development on Technology, AEC, testified as to current nuclear capital and operating costs generally.

(v) The City of New York, the Palisades Interstate Park Commission, the New York State Water Resources Commission, the Taconic State Park Commission, and many municipalities affected by the Project all participated in the proceeding.*

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* Scenic Hudson's petition at pages 20-21 states that the Bureau of Outdoor Recreation of the Department of the Interior and the Hudson River Valley Commission both recommended that the project "not be built". These assertions are not correct. The Bureau's report, entitled "Focus on the Hudson", and issued in 1966 referred to the remanded proceedings and the Department's position on the project as follows:

"The Federal Power Commission has scheduled a rehearing in September 1966 on the application of Consolidated Edison of New York. The Department of the Interior will intervene

(vi) The United States Public Health Service, Division of Air Pollution, was consulted by the FPC Staff in 1966 on the Project's effect on the alleviation of air pollution in New York City. The Public Health Service's expert, Mr. Ralph Longaker, testified for the Staff at the Commission hearings.*

The Petitioners invite this Court, despite the findings of the Court of Appeals, to use this case as a vehicle to instruct the federal agencies on proper compliance with NEPA, even though the record in this proceeding was closed prior to the passage of NEPA. Petitioners ignore

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in the rehearing for the purpose of presenting additional information as to the effect of the proposed project on fish and on scenic, historic, and other recreation resource values. At a pre-hearing conference on March 22, 1966, the Department stated that it expected to recommend that the powerhouse be placed underground."

The Hudson River Valley Commission recommended that the Project not be built, "if a feasible alternative can be found". The Federal Power Commission determined that none could be found. Moreover, the New York State Joint Legislative Committee on National Resources, referred to in note 9 on page 21 of Scenic Hudson's petition, held its hearings in 1964, eighteen months before the Company revised its plans in order to install the powerhouse completely underground.

Whatever the views of these agencies, the final policy decision as to whether or not the Project should be licensed lies with the Commission.

* Mr. Longaker's Division of Air Pollution Control was reorganized into the National Center for Air Pollution Control prior to the time he was cross-examined in 1967. The National Center later became part of the National Air Pollution Control Administration (NAPCA) (33 Fed. Reg. 9909 (1968)), which subsequently merged into the Environmental Protection Administration (35 Fed. Reg. 15623 (1970)). Accordingly, City is mistaken in its claim (City's Petition, pp. 23-24) that the Commission failed to consult the proper expert agency on air pollution matters in the case (i.e., NAPCA). The fact is that Mr. Longaker was an important official of the then principal Federal agency for air pollution control.

the fact that this is a "transition" proceeding; that is, the hearings were complete when NEPA became law. In that respect, the proceeding must be unique or at least but one of very few proceedings similarly cast. Hence, it would not be appropriate to select this proceeding as a vehicle to instruct the lower courts concerning NEPA requirements, if, indeed, such guidance is necessary. It is evident from the number of cases cited in Appendix B to Scenic Hudson's petition, that the lower courts are not reluctant to instruct the agencies as to the proper compliance with NEPA requirements. The broad language of NEPA was intended by Congress to enable the various agencies to work out its applicability to the matters before them individually in accordance with the particular circumstances presented in each case.

3. The Project will not endanger the Catskill Aqueduct.

The City argues that the Commission's decision to license the Project was made "in disregard of the City's objections" (Petition, p. 26). This is not so. In fact, the City's objections were considered at length. However, City's claims were unsupported by the evidence presented.

Con Edison presented the testimony and exhibits of several expert witnesses attesting to the safety of the Catskill Aqueduct during the initial hearings on remand in 1966-67. After the Presiding Examiner had concluded in his Initial Decision issued in 1968 that the safety of the Aqueduct was not endangered by the Project, the hearings were reopened in 1969 specifically to permit the City, which had not previously intervened, to present the basis of its claims with regard to the Aqueduct. After hearings at

which the City, the Commission Staff and Con Edison presented witnesses on this issue, briefing, and a second lengthy opinion of the Presiding Examiner, the Commission found that there was no basis for the City's concern for the safety of the Catskill Aqueduct. The Court of Appeals carefully reviewed the evidence upon which the Commission based its findings and found that there was substantial support in the record for those findings.

The evidence is indeed substantial. The Examiner's 1968 Initial Decision concluded that construction of the underground powerhouse would not endanger the existing aqueduct and that construction of a by-pass would not be required.* This conclusion was amply supported by the evidence of record.

City's direct evidence at the March, 1969 hearings, when stripped of rhetoric and speculation, consisted of a few lines of testimony by Mr. Thomas Fluhr, an admittedly over-cautious geologist (Fluhr, R. 16,847),** who has worked for the City for years.

Mr. Fluhr's very generalized direct testimony was simply that, either with or without a by-pass:

> "The risk of failure of the aqueduct cannot be regarded as imminent but it represents a definite hazard. . . ." (Fluhr, R. 16,837-8.)

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* In an effort to alleviate the City's concern, the Company proposed to relocate a section of the existing Aqueduct so that when in use the Aqueduct would "by-pass" the power station by more than 400 feet, which the City conceded to be a safe distance. However, the City also objected to some aspects of the by-pass plan.

** References are made herein to the record before the Commission, which has not been reproduced. If the Court desires, Respondent will make the testimony and exhibits referred to available.

Then on cross-examination Mr. Fluhr admitted:

> "I think while the risk may be small, I think that there is certainly some risk. . . . My view is that the risk is small." (Fluhr, R. 16,846.)

In rebuttal to City's claims, Con Edison, supplementing its presentation on this issue made prior to the Examiner's 1968 Initial Decision, presented the testimony of Dr. Bartlett Paulding, a geological engineer and a specialist on the brittle fracture of rock, with a doctorate from MIT in rock mechanics.

Dr. Paulding's sophisticated analysis confirmed the previous judgments of Con Edison's other experts (see Exhibit 464) that the underground powerhouse would have no significant effect on the Aqueduct.

City's witnesses attempted to buttress their speculative opinions by pointing to a cracking of part of the aqueduct tunnel lining which occurred in 1913 when it was first tested under pressure (Eide, R. 16,793-94; Fluhr, R. 16,835-36). Such cracking was probably caused by excessive water pressure during testing and insufficient rock cover (Mullarkey, R. 11,146; Eide, R. 16,805, 16,794). Whatever may have caused this problem, the matter was easily corrected at the time by the construction of a by-pass.

All of this evidence was weighed carefully by the Presiding Examiner and the Commission. It was reviewed with approval by the Court of Appeals. The Court found that the evidence supporting the Commission's decision on the aqueduct issue was abundant and substantial in both quality and quantity, and it emphasized that " . . . the resolution of highly complex technological issues such as these

was entrusted by Congress to the Commission and not to the courts" (453 F.2d at 480; City's Appendix, p. 34a).

The Supreme Court has established the principle that it does not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Garver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). The obvious showing here is that both the Court of Appeals and the Commission were correct.

In its petition for certiorari, City urges *de novo* review of the rulings by the Commission and Court of Appeals as to the facts by arguing that the FPC has no expertise on the subject of geological engineering or tunnel construction, particularly as related to aqueducts or water tunnels. Therefore, says City, this Court may feel free to review and reverse on the facts. City's argument is patently false.

The Commission is indeed expert on the construction of water tunnels and in fact is responsible under the Federal Power Act for the licensing of all hydroelectric "project works" including tunnels and all related appurtenances. Over the last 50 years, the Commission has licensed and monitored construction of literally hundreds of project dams, tunnels and reservoirs. We invite the Court's attention to the Commission's Annual Report for the year 1970 at pages 31-33 and at Table 1 for a listing of these projects. The same Annual Report at page 32 refers to the Commission's intimate involvement with the California Aqueduct project, a 460-mile municipal aqueduct which contains twelve pumping stations, four dams, four storage reservoirs and four generating stations, including a large pumped storage project. This massive combined aqueduct and

hydro project exemplifies the Commission's experience with water tunnel construction. Indeed, it is almost too elementary to point out that virtually all hydroelectric facilities include water tunnels, which are physically the same as public water supply aqueducts, with the possible exception that hydro tunnels have more complex engineering problems due to their association with related generating facilities. The Federal Power Commission is expert in this area, and is in fact designated by Congress as the agency to weigh the evidence and make informed engineering judgments on the subject. As the Court of Appeals recognized, judges learned in the law but without technical education, training and experience, and without the advice of those who are expert in technical matters are neither prepared nor charged to make such determinations. The City's contention is mistaken.

4. *The Cornwall Project meets the standards of Section 10(a) of the Federal Power Act as best adapted to a comprehensive plan for the development of the Hudson River.*

The Court of Appeals referred to Section 10(a)* as follows:

> "This is the statute upon which, to a large extent, our earlier remand was based. In our opinion we said that the phrase 'recreational purposes' 'undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of

* Section 10(a), in pertinent part, requires that a project " . . . be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; . . . ".

historic sites.' *Scenic Hudson*, supra at 614. We directed the Commission to consider all of these factors in reaching its decision.

"It is obvious that in finding compliance with our remand order, we also find compliance with the statute on which that order was based. As we have pointed out, the Commission has given careful and thorough consideration to 'recreational purposes,' and, indeed, has used its 'authority to require the modification of [the] project' in a number of aspects related to this end." (453 F.2d at 480; City's Appendix, p. 36a).

Petitioners urge that the Project should not have been licensed on the ground that there is not in existence a "comprehensive plan" for the development of the entire Hudson River Valley. That contention is without merit. As respondent's witness, Gilmore Clarke testified, it is unlikely that there will ever be a *single comprehensive* regional plan for the development and protection of *all* the land and water resources of the Hudson. But Mr. Clarke pointed out that no reasonable plan which might be developed could fail to include the Cornwall Project as an appropriate element.

Mr. Clarke asserted that it is incumbent on any individual or organization desiring to locate on the shore of the River "to direct its activities so that they will not conflict with or impede such public use of the resources of the Hudson River Valley as may be evolved" in such plans. In his opinion, obviously concurred in by the Commission, the Cornwall Project fulfills these criteria.

Mr. Clarke's expert opinion, together with the myriad other matters considered by the Commission as reflected in its Findings 217 and 218 quoted at pages 17-18 *supra*,

clearly justify the Commission's finding that the Project is "best adapted" to a comprehensive plan for the development of the Hudson River; and the Court of Appeals was correct in finding that the Commission fulfilled its responsibilities under Section 10(a) and had sufficient evidence to support its determination.

5. *Section 27 of the Federal Power Act has been consistently interpreted by this and other courts to require only the payment of compensation for water rights vested under state law.*

The City argues that Section 27* of the Federal Power Act bars construction of the powerhouse at the Cornwall site.

City's contention is inappropriate on the facts of this case because the Project plans do not call for any "control, appropriation, use, or distribution" of the City's water supply. The City's assertions on this issue are premised only upon the geological relationship between the powerhouse chamber and the Catskill Aqueduct. Moreover City's proposed interpretation of Section 27 has often been rejected as a matter of law. There is no conflict in the courts below on the interpretation of Section 27.

This Court in *First Iowa Hydroelectric Cooperative* v. *FPC* (328 U.S. 152 (1946)), discussed the meaning of §27, noting that the language, like that of Section 8 of the Reclamation Act of 1922 and the Ferris Public Lands Acts

* Section 27 provides that ". . . nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." [41 Stat. 1077; 16 U.S.C. 821].

of 1914 and 1916, was used in a purely proprietary sense (51 Cong. Rec. 13,630-31). The Court therefore held that the use in Section 27 of language "having a limited meaning in relation to proprietary rights under the reclamation law and in public land bills" carried the established meaning of such language into the Federal Power Act (*id.* at 177).

Such protection of vested water rights is necessary since the Federal government has a "navigation servitude" over navigable water of the United States and is free from the requirement of paying compensation when it takes over private water rights in navigable waters. See, e.g.: *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *United States* v. *Cress*, 243 U.S. 316 (1917); *United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945); *United States* v. *Twin City Power Company*, 350 U.S. 222 (1956); and *United States* v. *Grand River Dam Authority*, 363 U.S. 229 (1960). Section 27 merely makes clear that a Federal Power Act licensee is not clothed with such power. Section 27 requires a licensee to pay compensation if it condemns state-vested water rights, although the Federal government could itself acquire them without any such payment.

That Section 27 does not bar interference by a Federal licensee with local domestic water supplies, and that its sole function is to preserve state-conferred water rights from condemnation without the payment of compensation by the Federal licensee, has been most clearly stated by the Ninth Circuit Court of Appeals in *Portland General Electric Co.* v. *F.P.C.*, 328 F.2d at 176 (9th Cir., 1964):

> "The *only* purpose of section 27 is to preserve to holders of state-conferred water rights a right to compensa-

> tion if those rights are taken or destroyed as an incident to the exercise by another, of a license granted by the Commission." (Emphasis supplied).

A number of cases have held that Section 27 requires a licensee under the Federal Power Act to pay damages in compensation for the taking of state vested water rights: *Henry Ford & Son Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369 (1930); *U.S.* v. *Central Stockholders' Corp. of Vallejo*, 52 F.2d 322 (9th Cir. 1931); *F.P.C.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F.2d 940 (4th Cir. 1933), *cert. denied* 289 U.S. 748 (1933); *In re Green River Drainage Area*, 147 F.Supp. 127 (D.Utah, 1956).

Section 27 does not save state or local regulatory laws. See, e.g.: *First Iowa, supra; FPC* v. *Oregon*, 349 U.S. 435 (1955); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *State of Washington Department of Game* v. *F.P.C.*, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954). In these cases, the courts have consistently held that state statutes, which were legitimate exercises of state power, could not prevail in the face of the Federal Power Act because the Federal authority over the nation's waterways and their use is dominant.

The Court of Appeals rejected the City's contentions, pointing out that the license issued

> "... does not authorize Con Ed to divert any of the City's water or to interfere with the tunnel .... Section 27 was not intended to give the city the power to veto Commission action" (453 F.2d at 478; City's Appendix, p. 31a).

CONCLUSION

There is no basis in this proceeding for the grant of petitioners' requests for a writ of certiorari.

There is no error in the decision of the Court below; it is in conformity with the applicable statutes, and with decisions of this Court; it has not departed from the accepted or usual course of judicial proceedings.

There is no conflict between Circuit Courts of Appeal on any of the issues which were the subject of the proceeding below.

There is no conflict between the facts as found by the Commission and the facts as found by the Court below.

There are no constitutional issues involved in this case.

With a single exception, all of the statutes relied upon by petitioners have been considered and construed by this Court consistently in the past; the single statute which has not been the subject of extensive review by this Court, namely the National Environmental Policy Act, is not a proper subject for review here because the record in this nine year proceeding was closed at the time of the enact-

ment of that Act and the Court below has found that its requirements have been fully met.

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 25, 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1219

SCENIC HUDSON PRESERVATION CONFERENCE, *et al.*,
Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1220

THE CITY OF NEW YORK,
Petitioner,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1221

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,
Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

BRIEF OF TOWN OF CORNWALL IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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Dated: May 8, 1972

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Respondents.

BRIEF OF TOWN OF CORNWALL IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Appeals for the Second Circuit is reported at 453 F.2d 463 and is set forth in the appendix to the petitions for certiorari filed by Scenic Hudson Preservation Conference and the City of New York. That opinion affirmed an order and opinion of the Federal Power Commission licensing the construction by Consolidated Edison Company of New York, Inc. of a pumped storage hydroelectric project, the greatest part of which will lie in the Town of Cornwall, a municipal corporation of the State of New York.

Jurisdiction.

Jurisdiction is authorized under 28 U.S.C. §1254(1) and the Federal Power Act §313(b), 16 U.S.C. §8251(b).

Questions Presented.

The Respondent Town of Cornwall hereby begs leave to incorporate by reference the statement of the questions presented as the same is set forth in the brief of Consolidated Edison Company of New York, Inc. in opposition to petitions for a writ of certiorari.

Statement of the Case.

The Respondent Town of Cornwall hereby begs leave to incorporate by reference the statement of the case as the same is set forth in the brief of Consolidated Edison Company of New York, Inc. in opposition to petitions for a writ of certiorari.

Position of the Town of Cornwall.

The Federal Power Commission originally licensed a pumped storage project at Cornwall in 1965. Among other things the project, at that time, did not provide for a total undergrounding of the power house. In the first *Scenic Hudson* case the Court of Appeals set aside the licensing order and remanded the case to the Federal Power Commission. The Town of Cornwall intervened at that stage of the proceedings and has continued its involvement by participation in the hearings, the on-project inspection made by the presiding examiner and the argument before the Commission. The Town was permitted to intervene in the appeal to the Court of Appeals and the Cornwall Town Board has authorized continued participation in this matter.

The Town Board of the Town of Cornwall determined that it would be in the best interests of the Town and its residents to support this project. At each critical juncture during the six and one-half years since the remand by the Court of Appeals, the Town Board has continued its support. Their position accurately reflects the feelings of the overwhelming majority or the 10,000 residents of the Town of Cornwall.

Certainly no other group has a more immediate and personal concern than the people of Cornwall. Their unwavering endorsement is based upon a first hand knowledge and appreciation that the Hudson Highlands will not be ravaged as petitioners would have this Court believe. Moreover they know that when the project is completed, a rundown water front on the Hudson River will be restored and turned into a municipal park. While they may not have a direct interest in the power supply to New York City, they are understandably anxious that emergency power be available on an instantaneous basis.

The blackout of November 1965 struck Cornwall with the same disruptive effect as other communities in the northeast. They believe that the project will help insure that a similar power outage will never again occur.

The Writ of Certiorari should not be granted.

The Court below acted properly in all respects.

The Federal Power Act and the decisions of this Court set guidelines for a review of the Federal Power Commission's order and finding. The Court of Appeals followed those guidelines and correctly sustained the Commission.

Section 313(b) of the Federal Power Act provides that:

> "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

16 U.S.C. §825l(b). The Court of Appeals following this specific mandate determined that the findings of the Commission were, in fact, supported by substantial evidence.

Nor can there be a real dispute as to what is meant by substantial evidence; recent decisions of this Court including two cited by the Court of Appeals are clear in their guidance to the lower Courts. *Permian Basin Area Rate Cases*, 390 U.S. 747; *Gainesville Utilities Department v. Florida Power Corporation*, 402 U.S. 515.

In the petitions to this Court seeking certiorari, and in the Court below, the petitioners have urged that a new and broader standard be adopted when the Court review relates to matters of environmental policy. In

support of their proposal petitioner Scenic Hudson cites *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402. Respondent Cornwall cannot accept petitioner's reading of that case as in any way expanding or changing the standard of review to be followed by the Court. The old and accepted maxim that the Court may not substitute its judgment for that of the agency where the Court determines that the agency has done a complete and competent job is still the standard which must be followed. There is no valid reason for a change in the standard or method of review just because environmental issues have been considered by the agency. A major strength of our legal system is its ability to apply a time tested procedure for decision making to new problems as they arise.

Turning now to the theme which Respondent Cornwall finds underlying the petitions for certiorari. Each of the petitioners has said either explicitly or implicitly that the hearing examiner, the Federal Power Commission and finally the Court of Appeals did not fully appreciate all of the important issues in this case and the environmental questions raised. It is inconceivable that all involved failed to recognize that this project was one which would be scrutinized with the greatest of care and further that if the decision was to license the project that the same group who were successful in *Scenic Hudson I* would not once again test the validity of the new determination. Armed with the knowledge that a challenge would surely follow, those involved in the administrative determination and in the Court below would have been even more careful and diligent than usual to explore every possible alternative, to consider every related fact and factor and to carefully and properly reach a decision.

Conclusion.

There is no basis for the granting of petitioners' requests for a writ of certorari. The Court below did not err in making its decision; it has followed the statutory and case law guidelines set down for it.

The petitions seeking a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 8, 1972

FILED
MAY 30 1972

Nos. 71-1219, 71-1220 and 71-1221

In the Supreme Court of the United States

OCTOBER TERM, 1971

SCENIC HUDSON PRESERVATION CONFERENCE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

THE CITY OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER, PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (City App. 1a-62a)[1] is reported at 453 F.2d 463, and its orders denying rehearing (City App. 202a–204a) are reported at 453 F.2d 494. The opinion of the Federal Power Commission (City App. 63a–201a) is reported at 44 FPC 350 and its order denying petitions for rehearing is reported at 44 FPC 1189. The decisions of the Hearing Examiner are reported at 44 FPC 436 and 44 FPC 522.

JURISDICTION

The judgment of the court of appeals (Scenic Hudson App. A92–A93) was entered on October 22, 1971. Petitions for rehearing were denied on November 26, 1971 (City App. 202a–204a). On February 15, 1972, Mr. Justice Marshall extended the time for filing petitions for writs of certiorari to March 24, 1972, and on that date the petitions were filed. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission's order reaffirming the licensing of the construction of a pumped storage project on the Hudson River is rationally based and supported by substantial evidence on the record.

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[1] "City App." references are to the appendix to the petition filed by The City of New York, No. 71-1220. "Scenic Hudson App." references are to the appendix to the petition filed by Scenic Hudson Preservation Conference, *et al.*, No. 71-1219.

2. Whether the Federal Power Commission complied with the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, by (1) making exhaustive findings on environmental matters based on a record closed prior to the effective date of the Act and (2) including an environmental impact statement in its decision issued after the Act had become effective, and properly discharged its planning responsibilities under Section 10(a) of the Federal Power Act, 16 U.S.C. 803(a).

3. Whether Section 27 of the Federal Power Act, 16 U.S.C. 821, precludes the licensing of the present project, even though there is substantial evidence that the project will not interfere with the Catskill Aqueduct supplying water to New York City and there is no appropriation or use of the City's water.

STATUTES INVOLVED

Sections 101 and 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332 and 4333, are set forth at City App. 205a–209a. Sections 10, 27 and 313 (b) of the Federal Power Act, 16 U.S.C. 803, 821 and 825l(b), provide in pertinent part:

Section 10:

> All licenses issued under this subchapter shall be on the following conditions:
>
> (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improve-

ment and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * *

Section 27:

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Section 313(b):

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia * * *. Upon the filing of [a petition for review] such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. * * * The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

STATEMENT

In Opinion No. 584 (City App. 63a–201a), the Federal Power Commission granted a license to Consolidated Edison Company of New York, Inc., (Con Ed) for the construction, operation and maintenance of a pumped storage project on the Hudson River. On petitions for review, the court below affirmed, holding that the decision was supported by substantial evidence on the record and that the Commission had complied with its obligations under Section 10(a) of the Federal Power Act, 16 U.S.C. 803(a), and the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

A. DESCRIPTION OF THE PROJECT

The pumped storage development licensed by the Commission, known as the Cornwall project, is to be located on the Hudson River approximately 40 miles north of New York City and will consist of an upper storage reservoir, a completely underground powerhouse[2] and primary transmission lines (City App. 63a–64a, 192a–193a). The purpose of the project is to help meet the rapidly increasing energy demands of the New York City area by using off-peak energy generated by non-project steam electric, nuclear or other facilities to pump water from the Hudson River

[2] As originally proposed, the powerhouse was to be only 80 percent underground. Scenic Hudson witness Carmer testified that if an underground powerhouse were built, he would not oppose the project (R. 1013). "R" references are to the certified pagination listed in the Certificate of Record in Lieu of Record filed in the court below.

to the upper storage reservoir so that the water can be released during peak hours of demand to generate electricity (City App. 75a–76a).

The reservoir, with a surface area of 240 acres when filled to its maximum elevation of 1160 feet above mean sea level, is to be located behind Storm King Mountain and will not be visible from the river; it will be formed by five earth-and-rock filled dikes located in saddles between ridges (City App. 75a, 192a–193a). Eight pumping-generating units, with a total capacity of approximately 2,000 mw,[3] will be housed in the underground powerhouse (City App. 76a, 193a). At the river's edge, a 685-foot-long tailrace, with abutments at both ends and a horizontal cutback from the existing shoreline varying from 195 feet to 260 feet, will serve to withdraw water from and discharge water into the Hudson River. The tailrace will be located behind an existing railroad trestle upon which a fish protective device will be mounted (City App. 76a, 126a).

Rock excavated during construction of the powerhouse site will be used for the foundation of a 57-acre, mile-long, river-front park.[4] Located north and west of the project and adjacent to the present shoreline, the park area will include play areas, individual pic-

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[3] One megawatt (mw) equals 1 million watts.

[4] The park will improve considerably the present decayed state of the area abutting the river, once the site of extensive commercial and industrial development (City App. 119a). The Commission rejected Con Ed's proposal for a visitor's information center and parking facilities at the powerhouse site (City App. 125a).

nic sites and shelters, and sanitary facilities (City App. 77a, 117a). A 36-acre scenic overlook, abutting a state highway, will also be constructed and will provide picnic sites and a picnic shelter (City App. 117a).

Energy generated from the project will be transmitted by submarine cables across the Hudson River and by underground cables, each approximately 1.6 miles long, to the Cornwall East underground terminal point located on the east side of the Hudson River at Nelsonville. An overhead transmission system, not visible from the river, will extend from that point approximately 9.2 miles to Con Ed's existing Pleasant Valley-Millwood-Sprain Brook transmission right-of way in the vicinity of Kent on the west side of the Taconic State Parkway (City App. 76a, 193a–194a).[5]

B. PROCEDURAL BACKGROUND

The controversy over the Cornwall project first came before the court of appeals when the Scenic Hudson Preservation Conference—a petitioner herein—and the towns of Cortlandt, Putnam Valley and

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[5] The Commission authorized an alternate underground powerhouse site, occupying 34.4 acres in the Palisades Interstate Park, to be utilized if construction at the first site were precluded on judicial review (City App. 191a–192a). This location would provide shorter tunnels between the upper reservoir and powerhouse and a shorter river crossing for the transmission line. Construction at this site would eliminate the open tailrace and proximity to the Catskill Aqueduct. The scenic overlook, waterfront park, and upper reservoir would be the same (City App. 164a–171a). The court of appeals did not review this aspect of the Commission's order (City App. 14a, n. 6).

Yorktown sought to have three Commission orders set aside: (1) an order licensing Con Ed to construct the Cornwall pumped storage project, then designed to be partially above-ground (33 FPC 428); (2) an order denying applications for rehearing and for the reopening of proceedings to permit the introduction of additional evidence (33 FPC 964); and (3) an order denying joint motions to expand the scope of supplemental hearings to include consideration of the practicality and cost of underground transmission lines and of the feasibility of fish protective devices (33 FPC 965). The court of appeals concluded that the Commission should have received evidence on gas turbines, fish protective devices and underground transmission facilities and, accordingly, set aside all three orders and remanded the case to the Commission for further proceedings. *Scenic Hudson Preservation Conference* v. *Federal Power Commission* (*Scenic Hudson I*), 354 F.2d 608 (C.A. 2), certiorari denied *sub nom. Consolidated Edison Co.* v. *Scenic Hudson Preservation Conference,* 384 U.S. 941 (Scenic Hudson App. A62–A91).

Finding that the phrase "recreational purposes" in Section 10(a) of the Federal Power Act, 16 U.S.C. 803(a), encompasses "the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites" (Scenic Hudson App. A69), the court directed that on remand the proceedings must "include as a basic concern the preservation of natural beauty and of national historic shrines" (Scenic Hudson App. A90). In stressing the Commis-

sion's duty to develop a complete record, the court required the Comission to make a thorough study of possible alternatives to the * * * project (Scenic Hudson App. A66) and to reexamine the whole fisheries question (Scenic Hudson App. A90). The court also found that the Commission had failed adequately to weigh the economic disadvantages of underground transmission lines against the aesthetic advantages (Scenic Hudson App. A87).

On remand, the Commission ordered (35 FPC 151) further proceedings before a Hearing Examiner to supplement the existing record. All parties were free to offer evidence on *all* matters bearing on whether a license for the project should be granted (*id.* at 152). Extensive proceedings were held on remand and, prior to issuing their decisions, both the Hearing Examiner and the Commissioners viewed the proposed project sites.

In August 1968, the Hearing Examiner issued his Initial Decision recommending that the license be granted (44 FPC 436). His decision contained extensive discussion of the proposed alternatives to the Cornwall project (44 FPC at 456–472), the impact of the project on scenic beauty and historical sites (44 FPC at 472–491), the fisheries question (44 FPC at 492–507), the routing and undergrounding of the transmission facilities (44 FPC at 507–513), the possible effect of the project on the Catskill Aqueduct serving New York City (44 FPC at 513–515), air pollution (44 FPC at 515–516) and the acquisition of the upper reservoir site (44 FPC at 516–517).

After the examiner's decision, the City of New York moved to intervene and introduce further evidence on possible hazards to the Catskill Aqueduct from the proximity of the proposed powerhouse. As a result, the Commission reopened the proceedings (40 FPC 1310) and additional evidence was received, including evidence on alternative powerhouse sites. In a Supplemental Initial Decision, issued in December 1969 (44 FPC 522), the Hearing Examiner concluded that location of the powerhouse at the Cornwall site presented no hazard to the Catskill Aqueduct and, again, recommended granting the license.

C. THE COMMISSION'S DECISION

In its opinion,[6] the Commission stated that the fundamental issue in the proceeding was (City App. 77a)

> * * * whether the project offers substantially more reliable electric service as well as cheaper electricity generated in a cleaner manner than any other feasible alternative and, if so, whether the project will create detrimental aesthetic and environmental conditions of such degree as to lead on balance to a judgment that the public convenience and necessity would be better served by denying the application herein.

In deciding this issue, the Commission first considered the power needs of the Con Ed system which will be met by the proposed project and concluded that a pumped storage project, capable of quick sustained response to electric energy demands, is best

[6] To the extent not inconsistent with its own opinion, the Commission adopted the examiner's decision (City App. 200a–201a).

suited to provide reliable power during peak periods of demand. The Commission then evaluated in detail the following possible alternatives to a pumped storage project: (1) gas turbine generation; (2) all nuclear generation; (3) a nuclear-gas turbine generation combination; (4) the purchasing of power from other systems; (5) alternate conventional or pumped storage sites for hydroelectric generation; (6) generation of power from plants constructed next to coal mines; (7) conventional thermal units; and (8) fuel cells and other exotic methods of generation (City App. 96a–111a). Although only an all-gas-turbine facility and a gas turbine-nuclear combination "were seriously advanced as potentially feasible alternatives" (City App. 96a), each alternative was analyzed in terms of electric reliability, economics and environmental impact. On the basis of these criteria, the Commission found that the Cornwall project was superior to any possible alternative (City App. 189a).

The Commission next considered the environmental and aesthetic effects of the project works (City App. 111a–147a). It found the scenic impact minimal, since the powerhouse[7] and tunnel will not be visible and the size and location of the portal entrance and tailrace are such as not to detract from the view of Storm King Mountain.[8] The upper reservoir will not be seen

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[7] The powerhouse will be located beneath a riverside foothill in the Village of Cornwall and not underneath Storm King Mountain itself (City App. 116a).

[8] All external project works at the powerhouse site will be located below Storm King Highway which crosses the base of the mountain at elevations varying from 200 to 280 feet. The

from the Hudson River, and will blend with other artificial lakes in the area (City App. 161a–163a). The transmission lines in the vicinity of the river will be either underground or underwater. The above ground lines will not be visible from the river and will utilize existing rights-of-way as much as possible (City App. 125a–126a). The Commission found that further undergrounding would be less reliable and the aesthetic benefits to be derived would not justify the increased cost ultimately to be borne by the consumer (City App. 171a–183a).[9]

Based upon the evidence of record, the Commission found that the percentage of the fish affected by project operations will be small and the fish population will be well protected by screening[10] and replenished by hatchery operations (City App. 135a–147a).[11] The

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vertical rock cut for the tailrace and abutments rises from 10 to 32 feet above the water line (or a maximum of 20 feet above the existing railroad embankment). Storm King Mountain is 1,343 feet high (City App. 116a). The examiner discussed in detail the minimal impact of the project works on the scenic beauty of the area (41 FPC 475–477).

[9] The wooded character of the licensed route will provide natural screening and the alignment of the valleys in a northeasterly direction will facilitate location of the lines below the crests, thereby minimizing their visual impact (City App. 182a).

[10] Article 36 of the license requires Con Ed to undertake studies during the first three years of operation to assess the project's impact on the fish population and to submit plans for this study no later than one year prior to completion of the project. Additionally, Article 36 provides for modification of the fish protection facilities as may be required (City App. 193a–196a).

[11] The Commission took official notice of a study sponsored by the New York State Conservation Department and the United States Fish and Wildlife Service in which the New

Commission also found that the project will be compatible with existing and proposed recreational development of the Hudson River Gorge area, and that the proposed scenic overlook [12] and park will enhance the area (City App. 123a–125a). The Commission weighed the fact that the area has historical significance, and concluded that no historical site will be adversely affected by the project (City App. 129a–131a).

In considering the contention that the project would constitute a hazard to the Catskill Aqueduct (City App. 147a–157a), the Commission found, on the basis of expert testimony, that the geology of the area is such that the aqueduct will not be in jeopardy from either stress changes during excavations or vibrations resulting from blasting.[13]

Jersey Department of Conservation and Economic Development and the United States Bureau of Sport Fisheries and Wildlife and of Commercial Fisheries participated, entitled *Hudson River Fisheries Investigations*, 1965–1968 (City App. 136a). The study concluded that there would be no significant adverse effects on the striped bass and American shad fisheries of the Hudson River from construction of the Cornwall project (City App. 29a).

[12] A 1957 report (Report on the Land and Water Resources of the New England-New York Region, Sen. Doc. No. 14, 85th Cong., 1st Sess.) recommended for the Hudson River Gorge "establishment of a system of highway waysides * * * to make available, in a safe manner, the scenic vistas of the countryside" (R. 2a–6a; City App. 29a).

[13] The court of appeals summarized the expert testimony on the possibility of damage to the aqueduct from blasting. Although witnesses for the City testified that blasting might present hazards, another witness disagreed sharply (City App. 32a–34a).

D. THE DECISION BELOW

Eight petitions for review of the Commission's decision were filed and consolidated in the court below. They alleged that the Commission had failed to comply with the Court's directives in *Scenic Hudson I*, that there was insufficient evidence to support the Commission's findings and that the Commission had not complied with the Federal Power Act, 16 U.S.C. 791a, *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

In upholding the Commission, the court below first held that the standard for judicial review with respect to all the Commission's findings of fact is the substantial evidence test; the court refused to adopt a different standard for the review of findings on environmental matters (City App. 7a–11a).

The court reviewed in detail the Commission's findings relating to (1) alternatives to the project (City App. 14a–20a), (2) the impact of the project on natural beauty and historical sites (City App. 21a–26a), (3) the fisheries question (City App. 26a–28a), (4) the undergrounding of transmission lines (City App. 28a–30a), and (5) the Cat-kill Aqueduct (City App. 31a–35a), and concluded that in each instance, the findings were amply supported by the record.

The court also held that the Commission had complied with its obligations under the Federal Power Act and NEPA to take into account environmental matters—such as the need to conserve natural resources and preserve scenic beauty and historical sites—and that there was "no real dispute" as to the

other findings required by Section 10(a) of the Federal Power Act, 16 U.S.C. 803(a) (City App. 36a). The court noted that NEPA envisions a "full consideration and balancing of various factors" by an agency in making a decision but "does not require that a particular decision be reached," and ruled that the Commission had fully complied with NEPA through the use of a "systematic, interdisciplinary approach" and through consultations with other federal and state agencies (City App. 37a–38a). The court concluded (City App. 38a):

> In view of the exhaustive environmental findings which occupy a substantial portion of the Commission's opinion, and the Commission's explicit conformance with the enumerated portions of the required statement, we conclude that full compliance with the National Environmental Policy Act has been demonstrated.

ARGUMENT

The contentions raised in the petitions were carefully reviewed and properly rejected by the court below. Since there is no conflict between the decision below and any decision of this Court or any other court of appeals, further review by this Court is not warranted.

1. Petitioners urge (Scenic Hudson Pet. 32–37; City Pet. 13–19; Sierra Club Pet. 6–7) that the court below should not have applied the substantial evidence test in reviewing the Commission's findings since, in their view, a broader standard of review should be applied to review findings on environmental matters.

The applicable statute, however, specifies the standard of judicial review and does not distinguish between the review of findings on environmental matters and the review of findings on other matters.

Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), states in pertinent part that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Accordingly, in reviewing decisions of the Commission arising under the Federal Power Act, this Court has consistently emphasized the narrow and circumscribed role of a reviewing court and reaffirmed the applicability of the substantial evidence test. See, *e.g.*, *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453; *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515; *Udall* v. *Federal Power Commission*, 387 U.S. 428. Cf. *Permian Basin Area Rate Cases*, 390 U.S. 747. As the court below pointed out (City App. 9a–10a), the cases relied upon by petitioners (*Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402; *Udall* v. *Federal Power Commission*, *supra*; *Zabel* v. *Tabb*, 430 F. 2d 199 (C.A. 5), certiorari denied, 401 U.S. 910) held only that the respective federal agencies involved must consider environmental factors in given situations; those cases did not establish a new standard of review of agency findings after an agency has properly considered such factors.

With respect to the City of New York's contention (City Pet. 13–19) that the court below should not have deferred to the Commission's findings with re-

spect to the Catskill Aqueduct because the Commission does not possess expertise in geological matters, two additional points should be made. First, in licensing a conventional or pumped storage hydroelectric project, the Commission routinely considers the geological formation upon which the project will rest;[14] the evaluation of geological evidence is thus within the competence of the agency. Second, the Commission had the benefit of extensive expert testimony relating to the possibility of damage to the Catskill Aqueduct. Section 313(b) of the Federal Power Act, *supra*, makes it clear that it is for the Commission to resolve any conflicts in such testimony. The Commission's opinion, as the court below found, reflects a careful consideration of the evidence on this matter and its conclusion that the risk to the aqueduct is "remote" (City App. 157a) is supported by substantial evidence.

2. Petitioners' argument (Scenic Hudson Pet. 19–28; City Pet. 24–25; Sierra Club Pet. 7) that the decision below conflicts with *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, 449 F. 2d 1109 (C.A.D.C.) is without merit. In *Calvert Cliffs*, the court of appeals held that NEPA requires an agency fully to explore all relevant environmental factors in reaching its decision. 449 F. 2d at 1112–1115. The court observed that the detailed statement required by NEPA provides "evidence that the mandated decision making process has in fact taken

[14] License applications must include data relating to the foundations underlying a proposed project. See 18 C.F.R. 4.41. Exhibit L.

place * * *." 449 F. 2d at 1114. The holdings of the court below that NEPA requires that "all factors have been fully explored" and that the Commission's opinion contained "exhaustive environmental findings" and the environmental impact statement required by Section 102(2)(C) of NEPA (City App. 37a–38a), are consistent with the decision in *Calvert Cliffs*.

Nor does the holding below directly conflict with the holding of a different panel of the same court in *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (C.A. 2). The court in *Greene County* held that the Commission staff must prepare a draft environmental impact statement with respect to a license application prior to the hearing on the license.[15] In the present case, the extensive hearings and the two decisions of the Hearing Examiner preceded the effective date of NEPA. NEPA did become effective prior to the Commission's decision, however, and was taken into account in its ultimate determination as evidenced by the Commission's exhaustive discussion of environmental matters. In the special circumstances of this case, therefore, the question whether a draft environmental statement should have been prepared by the Commission staff prior to the hearing does not arise. Moreover, in *Greene County*, the court properly refused to halt

[15] The Solicitor General has authorized the filing of a petition for a writ of certiorari to review this aspect of the *Greene County* decision.

construction of two transmission lines where the application to construct them had been filed prior to the effective date of NEPA and authorization to construct them had been given subsequent thereto, because the Commission had required the applicant to give appropriate consideration to the protection of the environment and had independently investigated alternate routings. Although, unlike the situation here, the Commission never did issue an environmental impact statement with respect to the two lines, the court found that there had been "no obstinate refusal to comply with NEPA" and in allowing construction of the lines to go forward, the *Greene County* court cited the decision below. 455 F. 2d at 425. Because the Commission in the present case had not only exhaustively considered environmental matters, but also had issued an opinion containing an environmental impact statement, the court below properly refused to reverse the Commission's decision to license the Cornwall project.

3. Contrary to the argument of the City of New York (City Pet. 25–28), the court below properly held that Section 27 of the Federal Power Act (p. 4, *supra*), 16 U.S.C. 821, does not preclude the licensing of the Cornwall project. The statute by its terms is inapplicable since it protects rights in water, and nothing in the Commission's order authorizes Con Ed to appropriate or divert the City's water or authorizes interference with the aqueduct. If Con Ed does in fact interfere with the aqueduct,

Section 10(c) of the Act, 16 U.S.C. 803(c), makes Con Ed liable for damages.[16]

The court of appeals' conclusion (City App. 31a-32a) that Section 27 is intended only to preserve a right of compensation if state-conferred water rights are taken or destroyed is correct and in accord with the Ninth Circuit's decision in *Portland General Electric Co.* v. *Federal Power Commission*, 328 F. 2d 165, 176. The City argues that in the *Portland* case the Ninth Circuit improperly relied on this Court's decisions in *City of Fresno* v. *California*, 372 U.S. 627, and *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, both interpreting another statute, Section 8 of the Reclamation Act, 43 U.S.C. 383. In *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 176–177, n. 20, however, this Court noted that the language of Section 27 is similar to that of Section 8 of the Reclamation Act and entitled to the same interpretation with respect to proprietary rights.

Nor is there any conflict with this Court's decision in *Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369. In that case, the Court affirmed a judgment granting money damages under Section 27 and permanent injunctive relief to a power plant licensee under state law whose operations had been adversely affected by the action of a licensee under the Federal Power Act. There, the recovery of money damages

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[16] The court found that there was substantial evidence to support the Commission's finding that the Catskill Aqueduct will not be affected by blasting or excavation at the project site (City App. 32a). See pp. 11, 17, *supra*.

alone would have been wholly inadequate against the continuing wrongful conduct of the federal lisensee and the denial of injunctive relief would have led to a multiplicity of lawsuits. In the present case, however, the prospect of any injury occurring to the City of New York is remote.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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